STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 22, 1999
v	No. 198969 Recorder's Court
STEVE CARBIN, Defendant-Appellant.	LC No. 95-000066

Before: Hood, P.J., and Neff and Markey, JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial conviction for first-degree criminal sexual conduct, MCL 750.520b(1)(d); MSA 28.788(2)(1)(d). Defendant was sentenced to five to fifteen years in prison. We affirm.

I

Defendant's first issue on appeal is that he was denied the effective assistance of trial counsel because counsel failed to call witnesses who would have testified that defendant could not have escaped from the mental institution, where he was involuntarily admitted, on the day that he allegedly sexually assaulted the victim. We disagree.

Effective assistance of counsel is presumed; therefore, the defendant bears a heavy burden of proving otherwise. *People v Plummer*, 229 Mich App 293, 308; 581 NW2d 753 (1998). A successful ineffective assistance of counsel claim must meet a two-pronged test, establishing that: (1) the performance of counsel was below an objective standard of reasonableness under prevailing professional norms; and (2) a reasonable probability exists that, in the absence of counsel's error, the result of the proceeding would have been different. *Id*. at 307. A defendant must also overcome the presumption that the challenged action or inaction was trial strategy. *People v Leonard*, 224 Mich App 569, 592; 569 NW2d 663 (1997).

In the present case, defendant did not overcome the presumption that he received effective assistance of counsel because the testimony elicited from defense witnesses at the *Ginther*[1] hearing was

merely cumulative of the trial testimony of the defense witness, and thus did not substantially benefit defendant's alibi defense. At trial, the defense witness testified that it would have been difficult, but not impossible, for defendant to escape from and return to the mental institution without being noticed. Defense witnesses' testimony at the *Ginther* hearing did no more to prove that defendant was in the locked institution on the night that defendant is alleged to have sexually assaulted the victim than did the defense witness' testimony elicited at defendant's trial. Decisions regarding which witnesses to call, what evidence to present, or the questioning of the witnesses are considered part of trial strategy. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Here, defendant has failed to demonstrate that, but for counsel's failure to present these two witnesses' testimony, defendant would have been acquitted. Accordingly, defendant has failed to overcome the presumption that he received effective assistance of counsel.

II

Defendant next argues that there was insufficient evidence to convict him of first-degree criminal sexual conduct because there is no evidence that he was aided and abetted during the commission of the sexual assault. We disagree.

The elements that must be established to show that someone aided and abetted the commission of a crime are that:

> (1) the underlying crime was committed by either the defendant or some other person; (2) the defendant performed acts or gave encouragement which aided and assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time of giving aid or encouragement. [*People v Genoa*, 188 Mich App 461, 463; 470 NW2d 447 (1991).]

The terms "aiding" and "abetting" include all forms of assistance without regard to the quantum of such aid, as long as the effect was to induce the crime. *People v Lawton*, 196 Mich App 341, 352; 492 NW2d 810 (1992).

Viewing the evidence in the light most favorable to the prosecutor, we find sufficient evidence of aiding and abetting to sustain defendant's conviction. A second man performed several acts which aided and assisted in the commission of the sexual assault by defendant against the victim, including strangling, restraining, and applying physical force against the victim. It could also be inferred that this second man had knowledge that defendant intended to commit the sexual assault against the victim when he and defendant ambushed the victim and he assisted in restraining her movements toward safety. The second man stood by as defendant sexually assaulted the victim, and the two men, together, fled the scene. Defendant's sexual assault against the victim was aided by another person, which increased the potential danger to the victim, as well as decreased the possibility of the victim's escape. *People v Hurst*, 132 Mich App 148, 152; 346 NW2d 601 (1984).

III

Defendant's last issue on appeal is that hearsay testimony was improperly admitted. Because defendant failed to object to the admission of the alleged improper testimony, he has waived appellate review in the absence of manifest injustice. *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996).

At trial a police officer, who responded to the scene of the sexual assault and interviewed the victim, testified that the victim told him that the man who sexually assaulted her was someone that she knew. This statement was hearsay because it was offered to prove the truth of the matter asserted. MRE 801(c). Although hearsay statements are generally inadmissible as substantive evidence, MRE 802, there are several exceptions to the rule. At issue here is the "excited utterance exception," MRE 803(2).

There are two primary requirements for excited utterances: (1) there must be a startling event; and (2) the statement must be made while the declarant was still under the influence of an overwhelming emotional condition caused by the event. *People v Smith*, 456 Mich 543, 550-551; 581 NW2d 654 (1998). "[I]t is the lack of capacity to fabricate, not the lack of time to fabricate, that is the focus of the excited utterance rule." *Id*. at 551. On review, the trial court's determination whether the declarant was still under the stress of the event is given wide discretion. *Id*. at 552.

Without question, the sexual assault suffered by the victim was a startling event. It occurred at night, while the victim was alone in the building where she worked. After unsuccessfully bartering for her freedom, the victim was strangled and restrained with a telephone cord, kicked in the stomach and chased.

Regarding the second requirement, whether the victim was still under the stress of the assault when she told the police that she knew one of her attackers, we note that when the victim's friend arrived at the Center, she found the victim's clothes, bag, and coat trailing up the stairway. She also discovered that the victim was hysterical and ". . . hovered in the corner crying with the phone cord wrapped around her neck, slobbering. You could not touch her because she was just jerking." The police arrived approximately ten minutes later. We find no evidence suggesting that the stress arising from the assault had abated when the victim spoke with the police. The fact that the victim's statement was the result of police questioning does not, itself, preclude the statement from being an excited utterance. See *Smith*, *supra* at 553-554; *People v Hackney*, 183 Mich App 516, 524; 455 NW2d 358 (1990). We find no abuse of discretion in the trial court's determination that the statement at issue fell under the excited utterance exception to the hearsay rule.

Furthermore, we find that any error stemming from the admission of the officer's testimony regarding the victim's statement was harmless. MCR 2.613, MCL 769.26; MSA 28.1096. The officer's testimony was presented after the victim herself testified that she was attacked in two different, but well lit rooms, that she got a good look at one of her attackers, that she recognized defendant as her attacker because he was a member of the Center and she had seen him on several occasions, that she had defendant removed from the Center by her supervisor on two occasions, and that she was

"positive" and had no doubt in her mind that defendant was the man who sexually assaulted her. After a careful review of the entire record, *Smith*, *supra*, we are satisfied that any error in admitting the officer's testimony was harmless.

Affirmed.

/s/ Harold Hood
/s/ Janet T. Neff
/s/ Jane E. Markey

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).